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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ORACLE AMERICA, INC., Defendant.	OALJ Case No. 2017-OFC-00006

PLAINTIFF'S RESPONSE TO JUNE 19, 2017 ORDER TO SHOW CAUSE RE: RELEVANT PERIOD UNDER COURT REVIEW

Concerned that OFCCP's claim of Oracle's ongoing violations of the Executive Order will result in an ever-shifting evidentiary record, particularly with respect to data, the Court proposes corralling the record by limiting Oracle's liability in this case to January 17, 2017. However, while allegations of continuing violations may suggest a continually expanding and changing record at the hearing, in reality, the data and evidentiary record to be presented will be finite. Prematurely limiting Oracle's liability in this case, irrespective of whether the evidence shows Oracle continues to discriminate, is thus unnecessary.

The Court's concern intermingles two admittedly related issues: liability and discovery. But cabining discovery does not require limiting liability here. As practice in a multitude of Title VII cases shows, federal courts routinely permit plaintiffs to prove liability against an employer through the present. And doing so is crucial. Plaintiffs, like OFCCP here, generally seek injunctive relief to bring an end to an employer's offending conduct. A finding that an

employer's discrimination remains ongoing can be foundational to a court entering an injunction to stop the offending conduct, which OFCCP seeks here.

However, proving ongoing discrimination does not require perpetual discovery with constantly changing data, which seems to be at the heart of the Court's concern. As a legal matter, the parties must complete discovery and make necessary pre-hearing disclosures by specified deadlines, severing the data flow. And, as a practical matter, the data cannot be ever-changing because experts must, months before the hearing, analyze that data and disclose their opinions. Such analysis takes a substantial period of time, particularly when the data is voluminous and—as appears to be the case here—manual entry of data is necessary. On this defined record, along with testimony and previously-disclosed exhibits, the Court will then decide whether OFCCP carries its burden to prove Oracle's violations of the Executive Order remain ongoing (at least as of the date of its decision), whether those violations stopped at some earlier point in time, or whether Oracle never violated the Executive Order at all.

The Court and the parties are not in danger of having to chase a moving target at the hearing. OFCCP should therefore be permitted in this case to prove its allegations that Oracle's violations remain ongoing, and the Court should consider Oracle's liability for the alleged violations through the date of its decision.[1]

[1] To the extent Oracle argues for a date prior to January 17, 2017, the Court rejected such an argument by denying what was effectively Oracle's motion to strike OFCCP's allegations of violations occurring outside of the pre-hearing investigation, which OFCCP alleges continue through the present. *See* 6/19/17 Order Denying Mot. for J. on the Pleadings at 3-4. OFCCP understands the Order to Show Cause to raise the issue of addressing an evidentiary record dealing with alleged continuing violations. *See* 6/19/17 Order re Mot. for a Ruling Overruling Objections at 2 (expressing concern over "offer[ing] or analyz[ing] data that is changing even as the hearing is going forward").

ARGUMENT

I. Courts Routinely Allow Plaintiffs to Assert and Litigate Claims That an Employer's Discriminatory Conduct is Ongoing, Bringing Liability up through the Present.

OFCCP alleges that Oracle engaged in unlawful discrimination and continues to do so. *See* Am. Compl. ¶¶ 7-10. OFCCP's allegation that Oracle's unlawful discrimination is ongoing is commonplace, particularly in systemic discrimination cases like this one.

Courts regularly permit plaintiffs to prove allegations of ongoing discrimination through the present. Prime examples are private Title VII discrimination class actions, in which courts certify classes of employees seeking liability against their employers through the present. *E.g.*, *Porter v. Pipefitters Ass'n Local Union 597*, 208 F. Supp. 3d 894, 912 (N.D. Ill. 2016) (in Title VII case, certifying damages class of "[a]ll African American persons who were members of Local 597 at any time from November 14, 2003 to the present date"); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 545 (N.D. Cal. 2012) (in Title VII case, certifying damages class of "[a]ll women who have been employed at any Costco warehouse store in the U.S. since January 3, 2002"); *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243, 249 (S.D.N.Y. 2007) (in Title VII case, certifying class of "all women who are currently holding, or have held, a sales-related job position with [the defendant] during the time period July 15, 2002 through the present"); *Williams v. Boeing*, 225 F.R.D. 626, 628 (W.D. Wash. 2005) (in Title VII case, certifying "African-American salaried employees employed by Heritage Boeing from June 6, 1994 to the present . . . , seeking injunctive relief for racial discrimination in compensation and promotions"); *Ligon v. Frito-Lay, Inc.*, 82 F.R.D. 42, 49 (N.D. Tex. 1979) ("A class may be properly certified from January 25, 1973 to the present."). Courts likewise permit the Equal Employment Opportunity Commission ("EEOC") to litigate cases in which the Commission alleges that the employer discriminates through the present. *E.g.*, *EEOC v. J & R Baker Farms,*

Inc., No. 7:14–CV–136 (HL), 2015 WL 4753812, at *1 (M.D. Ga. Aug. 11, 2015) (denying motion to dismiss case involving allegations pattern or practice of unlawful discrimination "beginning in September 2010 and continuing through the present date"); *EEOC v. Compania Mexicana De Aviation*, S.A., No. 81 C 0296, 1981 WL 320, at *1 (N.D. Ill. Oct. 16, 1981) (case involving allegation "that defendant has, since at least July 2, 1965, and continuously through the present, intentionally engaged in a policy and practice of failing to promote female employees into managerial positions while promoting males of lesser qualifications and experience").

Proving violations through the present is central to the injunctive relief plaintiffs typically request in discrimination cases. Plaintiffs seeking to remedy discrimination, like OFCCP here, generally ask courts to enter injunctions prohibiting an employer from continuing to engage in discriminatory conduct. *See* Am. Compl. at 7. It is hornbook law that proof of ongoing unlawful conduct through the present will support the entry of such an injunction. *See, e.g.*, *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) ("[P]ast wrongs are not enough for the grant of an injunction; an injunction will issue only if the wrongs are ongoing or likely to recur.") (citation omitted). Thus, rather than prematurely limit its consideration of Oracle's liability to January 2017—almost a year-and-a-half before the hearing—the Court should consider Oracle's conduct through the date of its decision to ensure it can support any award of injunctive relief.

Consistent with how other systemic discrimination cases are litigated in federal courts, OFCCP should be permitted in this case to prove Oracle's liability through the present.

II. Litigating Liability through the Present Will Not Require the Perpetual Flow of Data That Appears to Underlie the Court's Concern.

Given that courts permit plaintiffs to pursue liability through the present, courts permit discovery of employers' documents and records through the present. For example, various courts—including the OALJ—compel discovery of employers' records through the present. *E.g.*,

OFCCP v. JBS USA Holdings, Inc., No. 2015-OFC-1, at 11 (OALJ Apr. 22, 2016) (ordering production of responses and documents related to the defendants' hiring policies, procedures, and practices "from June 30, 2009 to the present") (attached as Ex. 3 to OFCCP's Compendium of Administrative Cases in Support of Motion re: Temporal Scope of Discovery); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 308 (S.D.N.Y. 2012) (ordering disclosure of data "from January 1, 2002 forward"); *EEOC v. Altec Indus., Inc.*, 2012 WL 2295621, at *2 (W.D.N.C. 2012) (ordering production of hiring records from 2006 "to the present" where EEOC had alleged a practice of religious discrimination against applicants for employment beginning in 2006); *Firkins v. Pfizer, Inc.*, No. CV 10–5108 RBL, 2010 WL 4483825 (W.D. Wash. Oct. 29, 2010) (in discrimination case, compelling production of various documents from a past date "to the present"). While discovery in discrimination cases is commonly ordered through the present, discovery does not—and as a practical matter cannot—continue in perpetuity. Procedural rules and court deadlines bring discovery to an orderly close and ensure that the factfinder has a finite record to make its decision.

To illustrate how a finite record will be developed here, OFCCP must obtain all evidence and data it will use to prove its allegations of ongoing discrimination prior to the close of fact discovery. *See* 5/10/17 Order after Scheduling Conference at 2 (setting fact discovery cutoff). As a practical matter, such evidence must be produced far in advance of that date to permit the necessary comprehensive expert consideration and analysis. The expert analysis here will be a lengthy process, involving statistical analyses of thousands of implicated employees and applicants and their myriad background characteristics. That analysis takes all the longer if, as it appears to be the case here, extracting data on employees and applicants requires manually reviewing source documents (*e.g.*, resumes) and methodically entering that information into an

electronic database. Oracle has already suggested that this will be necessary for various characteristics of employees and applicants, such as education and experience.

Further ensuring that the Court will have a static record to review are the expert disclosure requirements. As the Court is aware, expert opinions must be disclosed to the opposing party months before the hearing. *See* 29 C.F.R. § 18.50(c)(2) (requiring prior disclosure of expert testimony); 5/10/17 Order after Scheduling Conference at 2 (setting expert disclosure deadlines). And, of course, to disclose those opinions, expert analysis must be complete before the disclosure deadlines. This all practically means that, under the threat of exclusion, the data to be presented at the hearing and the expert opinion analyzing such data will be set in stone by the date all expert disclosures must be complete. *See* 29 C.F.R. § 18.57(c) (requiring exclusion of evidence at the hearing for failure to disclose "unless the failure was substantially justified or is harmless").

Granted, the documentary evidence and data presented at the hearing will be frozen as of the date of the fact discovery cutoff, and the Court may be understandably concerned about rendering a decision through the present based on evidence that is not the most current. However, this concern is illusory. Assuming that, at the close of fact discovery, the evidence produced to that point shows that Oracle's violations continue through that date, the Court should infer—absent countervailing evidence—that Oracle discriminates through the date of its decision. However, on the off chance that Oracle materially changes its conduct after fact discovery closes, it can limit its liability: the procedural rules permit the company to move the Court to supplement the record and produce such late-disclosed evidence, so long as good cause exists to do so. *See* 29 C.F.R. § 18.32(b) (permitting parties to move to extend time for good

cause). In such a case, the Court can review the late-disclosed evidence and consider whether the evidence supports limiting Oracle's liability short of the present.

The Court may also be concerned about uncertainty as to what must be produced if requests are made for materials through the present. However, as noted above, courts routinely order production of materials through the present, which typically means that the responding party's production must be complete and accurate as of the date it is produced, subject to the duty to supplement if the production is "in some material respect . . . incomplete or incorrect." *See* 29 C.F.R. § 18.53(a). For instance, if policies and procedures are requested through the present, Oracle must produce whichever policies and procedures are in effect at the time of production, supplementing that production only if there are any material changes thereafter. To the extent this obligation raises any confusion between the parties, which it should not, OFCCP will work collaboratively with Oracle to resolve any questions.

Ultimately, given the Court's procedural rules and deadlines, the Court and the parties will not be chasing a moving target at the June 2018 hearing. Given that this is not a danger, the Court should permit OFCCP here to litigate Oracle's liability through the present and obtain discovery through the present.

CONCLUSION

There is no need to limit, prior to the presentation of evidence, Oracle's liability to the date OFCCP filed this case. OFCCP should be permitted, as other plaintiffs in discrimination cases, to prove that Oracle's violations of the Executive Order are ongoing, continuing through the present.

OFCCP thus respectfully requests that the Court consider Oracle's non-compliance with the Executive Order through the date of its decision.

Respectfully submitted,

Date: June 30, 2017

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CERTIFICATE OF SERVICE

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On June 30, 2017, I served the foregoing **OFCCP'S RESPONSE TO ORDER TO SHOW CAUSE RE: DATE OF NON-COMPLIANCE** on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

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I declare under penalty of perjury that the above is true and correct.

Date: June 30, 2017

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